Supreme Court, U.S.
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No. 09-1480

In The
Supreme Court of the United States

PETER F. SUTTON,

Petitioner,

versus

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does evidence of fraud by a mortgage broker in misrepresenting the terms of a loan to the borrower, and misrepresenting the borrower's income to the lender, create a triable issue as to whether a yield spread premium paid by the lender to the broker violates the prohibition in 12 U.S.C. § 2607 against kickbacks and unearned fees when there is no evidence the lender was aware of the fraud or colluded with the broker?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings for which review is sought are those appearing in the caption of this case. In addition, Apex Mortgage Services, LLC was a named party defendant in the district court. Bank of America Corporation, a publicly traded company, is the parent corporation of its wholly-owned subsidiary Countrywide Financial Corporation. Countrywide Financial Corporation is the parent corporation of respondent, Countrywide Home Loans, Inc.

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Respondent, Countrywide Home Loans, Inc. ("**Countrywide**"), respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Peter F. Sutton ("**Sutton**") refinanced his house with a loan he could not afford even though he was aware of the loan terms when signing the closing documents. Then, instead of rescinding the loan within the 3-day rescission period, he sued his mortgage broker, Apex Mortgage Services, LLC ("**Apex**"), and lender, Countrywide, claiming violations of Florida's Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201 *et seq.* ("**FDUTPA**"); Florida law prohibiting "fraud, misrepresentation, deceit, negligence, or incompetence in any mortgage financing transaction," FLA. STAT. § 494.0041(2)(b); Florida's elder abuse law, FLA. STAT. § 825.102(b); and Section 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 ("**RESPA** § 8") (*see* Pet. App. 17-22).

At the hearing on Countrywide's motion for summary judgment, Sutton produced evidence related to misrepresentations by *Apex* – which went out of business and defaulted. Sutton claimed Countrywide should have known he could not afford the loan, and, because Apex allegedly performed broker services

inappropriately, the "yield spread premium"[1] Countrywide paid to Apex for those services was an illegal kickback or unearned fee under RESPA § 8. Countrywide produced evidence and argued the yield spread premium was not illegal because it was reasonable in light of the numerous services Apex provided. Countrywide also repeatedly argued that Countrywide could not be held liable for Apex's independent activities.

In an unpublished decision, the district court found:

> Sutton alleges that the yield spread premium violates RESPA because it is excessive in light of the broker services Apex provided. In essence, his claims are that, *in light of Apex's alleged bad acts with respect to Sutton . . . any yield spread premium paid to Apex was improper.*

Pet. App. 10 (emphasis added). The district court granted Countrywide's summary judgment motion, stating:

> The relevant inquiry is whether the total compensation is reasonable in light of the array of services the broker provided . . . Sutton has come forward with no evidence that Countrywide knew or should have

[1] The Eleventh Circuit describes yield spread premiums in its opinion. Pet. App. 4-5.

> known what Apex was doing. Absent evidence that Countrywide knew what Apex was doing or colluded with Apex in some way, Sutton has failed to show that genuine issues of fact remain for resolution on his RESPA claim, and that claim must be dismissed.

Pet. App. 12-13. The district court declined to exercise supplemental jurisdiction over Sutton's state law claims and remanded them to state court. Pet. App. 13.

Sutton appealed the entry of summary judgment but could not establish Countrywide acted inappropriately or that the yield spread premium was illegal under the two-part test – designated by the Department of Housing and Urban Development ("**HUD**") in RESPA Statement of Policy 1999-1[2] and RESPA Statement of Policy 2001-1[3] – used by federal courts to determine the legality of yield spread premiums.

The Eleventh Circuit affirmed the summary judgment in an unpublished opinion. Quoting

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[2] RESPA Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (March 1, 1999) ("**Policy Statement 1999-1**").

[3] RESPA Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001) ("**Policy Statement 2001-1**").

Culpepper v. Irwin Mortgage Corporation, 491 F.3d 1260, 1273 (11th Cir. 2007) – the leading case addressing yield spread premiums – the court described the HUD two-part test:

> First, we ask whether the broker performed "actual services" in the course of arranging the mortgage transaction. . . . If the answer to the first question is no, then a [RESPA] violation has been established. If the answer to the first question is yes, we then proceed to ask whether the total compensation was reasonable in light of the total array of services the broker performed.

Pet. App. 5. The court then determined the yield spread premium satisfied the test "[b]ecause Apex performed tasks to further the processing and origination of the loan, [and] Countrywide received value from Apex's services." *Id.* at 6. The court rejected Sutton's argument, stating RESPA's "anti-kickback provisions . . . are not the appropriate vehicle for considering globally . . . whether a broker provided fair, honest, and competent service to a borrower." Pet. App. 6. The court noted Sutton did not present sufficient evidence demonstrating Countrywide knew or should have known of Apex's acts. *Id.* at 7 n. 6. As such, it "refused to consider whether Countrywide would have violated the anti-kickback provision of [RESPA] had it colluded with Apex." *Id.* For this reason, the question presented *infra*

page i is narrower than the question presented in Sutton's petition (*see* Pet. at i).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. The Question Presented Does Not Justify Certiorari Review.

Sutton states the obvious – predatory lending and mortgage broker fraud are important issues. Pet. 7-9. The real question – whether RESPA § 8 provides a remedy for broker fraud when there is no evidence the lender was aware of the fraud or colluded with the broker (*infra*, p. i) – is not sufficiently important to justify certiorari review. As the Eleventh Circuit recognized in refusing to publish the decision at issue, this question does not present an important issue of federal law with significant practical consequences. RESPA § 8 addresses and proscribes the payment of kickbacks and unearned fees in association with mortgage loan transactions; RESPA § 8 is not directed to broker fraud. Numerous other state and federal laws address and protect borrowers from broker fraud and provide remedies. Because other viable protections and remedies for broker fraud exist, the practical consequences of the Eleventh Circuit's decision as to borrowers are not significant. Indeed, the opposite is true because, had the Eleventh Circuit ruled in Sutton's favor, the consequences for lenders would be significant.

Neither the HUD Policy Statements nor case law indicate that RESPA § 8 was enacted for the purpose of combating broker fraud or misrepresentations of the type alleged by Sutton against Apex. If Sutton's argument is accepted, lenders that have no way of knowing a broker is acting improperly or that a borrower is unhappy with the terms of a loan – such as Countrywide in this case – could be found liable under RESPA § 8 each time they pay a yield spread premium. This would result in an evisceration of yield spread premium payments to brokers, a practice HUD finds beneficial to borrowers. *See* Policy Statement 2001-1, 66 Fed. Reg. at 53054. Sutton's subjective standard also would be much more difficult to apply than the HUD two-part test.

Numerous state and federal laws protect borrowers from broker fraud and provide remedies. In fact, Sutton continues to litigate claims against Countrywide in state court for violations of FDUTPA, FLA. STAT. § 494.0041(2)(b), and Florida's elder abuse law. Other claims, such as civil conspiracy or common law fraud, are also available in state or federal court. Under federal law, borrowers are protected by the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, requiring clear disclosure of key terms and costs of lending arrangements. Other examples are broadly interpreted federal mail and wire fraud statutes and the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, enhancing criminal enforcement of federal laws regarding mortgage fraud.

These and other laws protect borrowers from broker fraud. Because other remedies exist, the question of whether RESPA § 8 *also* provides a remedy for broker fraud when the lender has no knowledge of the fraud is not sufficiently important to justify certiorari review.

2. The Circuits Do Not Conflict And The Eleventh Circuit Correctly Interpreted RESPA.

No conflict exists among the circuits. A footnote in a case that does not even address yield spread premiums or broker fraud does not establish a conflict. In fact, only one court of appeal – the Eleventh Circuit in the unpublished and non-binding decision issued in this case (Pet. App. 1-8) – has addressed whether broker fraud should be considered in determining whether a lender has violated RESPA § 8. It rightly holds RESPA's "anti-kickback provisions . . . are not the appropriate vehicle for considering globally . . . whether a broker provided fair, honest, and competent service to a borrower." Pet. App. 6.

Alston v. Countrywide Financial Corporation, 585 F.3d 753, 755 (3d Cir. 2009), offered as the conflicting case (Pet. 9-10), addresses an entirely different issue whether RESPA § 8 creates a private right of action when there is no overcharge allegation. In *Alston*, homebuyers alleged that premiums paid to a lender-affiliated reinsurance company were kickbacks to the

lender by the primary insurer in return for the lender's referral of business. *Id.* at 757. The homebuyers *did not* allege broker fraud, and the Third Circuit *did not* apply the HUD two-part test. *See generally, id.*

Sutton relies on footnote 9 of *Alston* to "conjure up" a conflict. Pet. 9-10. Therein, the Third Circuit refused the lender's request to consider, on a motion to dismiss, whether services were "actually performed" by the reinsurance company. *Id.* at 761 n. 9. The court noted, as an example, that "legitimate business services" are "actually performed," but it did *not* address whether, under the HUD test, broker fraud should be considered in determining whether "actual services" were performed. *See id.* This footnote does not conflict with the Eleventh Circuit's decision in the instant case.

The *district court* cases cited by Sutton (Pet. 10) likewise do not create a conflict among the circuits and are distinguishable. In *DeLeon v. Beneficial Construction Company*, 55 F. Supp. 2d 819, 824 (N.D. Ill. 1999), the borrower survived a motion to dismiss under RESPA when he alleged that *no* services were performed by the broker. This holding has no bearing here because even Sutton admits Apex performed services. In *Maganallez v. Hilltop Lending Corporation*, 505 F. Supp. 2d 594, 604 (N.D. Cal. 2007), the court stated it could consider broker misrepresentations in determining the value of broker services but nevertheless recognized that *the borrowers still had to show another broker would have not been paid a*

similar amount for the services. The court held that, at the motion to dismiss stage of the proceedings, it was premature to dismiss a claim before the parties could present evidence in this regard. *Id.* Here, Sutton *did* have an opportunity to present evidence but failed to do so.[4]

Sutton's assertion that the HUD Policy Statements are consistent with *Alston* (Pet. 10) is incorrect. Sutton quotes Policy Statement 2001-1 for the proposition that yield spread premiums *may* violate RESPA § 8 (Pet. 10-11) but ignores important phrases in the quote:

> HUD also recognizes, however, that in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread

[4] The petition omits discussion of cases where borrowers' allegations of fraud were very similar to Sutton's, but the courts found no violation of RESPA § 8. *See Stutzka v. McCarville*, 420 F3d 757, 758-9 (8th Cir. 2005) (broker exaggerated income of blind and mentally handicapped borrower, processed loan at a fixed rate but closed it at a variable rate, and the monthly payment after refinancing was greater than the monthly payment before refinancing); *see also Chow v. Aegis Mortg. Corp.*, 286 F. Supp. 2d 956, 963 (N.D. Ill. 2003) (lender provided inconsistent and potentially misleading TILA disclosures, uniform settlement statement, and good faith estimates); *see also Prince Servance v. BankUnited, FSB*, No. 07-C-1259, 2009 WL 2448103 *5 (N.D. Ill., Aug. 9, 2009) (unpublished opinion) (summary judgment for lender over allegations of fraud and deception).

> premiums as a way to enhance the profitability of mortgage transactions *without offering the borrower lower up-front fees*. In these cases, yield spread premiums serve to increase the borrower's interest rate and the broker's overall compensation, *without lowering up-front cash requirements for the borrower*.

66 Fed. Reg. at 53054 (emphasis added). Abuses occur when yield spread premiums do *not* lower the borrower's up-front cash requirements. In the case at issue, the yield spread premium lowered Sutton's up-front cash requirement – Sutton paid no cash at closing and, in fact, received a disbursement. Indeed, Policy Statement 2001-1 promotes the use of yield spread premiums:

> [A] yield spread premium can be a useful means to pay some or all of a borrower's settlement costs. In these cases, lender payments reduce the up front cash requirements to borrowers. In some cases, borrowers are able to obtain loans without paying any up front cash for the services required in connection with the origination of the loan. Instead, the fees for these services are financed through a higher interest rate on the loan. The yield spread premium thus can be a legitimate tool to assist the borrower. The availability of this option fosters home ownership.

66 Fed. Reg. at 53054.

Sutton ignores that, in applying the HUD test to the yield spread premium Countrywide paid to Apex, the Eleventh Circuit closely adhered to case law precedents and the Policy Statements (Pet. App. 5-6), none of which indicate broker fraud should be considered when determining whether the broker performed "actual services" or if the total compensation paid for those services was reasonable.

The 1999-1 Policy Statement contains a non-exclusive list of what HUD considers to be "actual services", including services like completing the loan application, collecting financial information, and ordering appraisals. 64 Fed. Reg. at 10085. Instead of arguing services were not rendered, Sutton argues the first prong of the HUD test was not met because the services were part of a fraudulent scheme. Pet. 12. Sutton's displeasure with his loan has no bearing on whether actual services were performed. The Eleventh Circuit correctly held that the yield spread premium was legal under the first-prong of the HUD test. Pet. App. 6-7.

The Eleventh Circuit also properly found that the total compensation for Apex's services was reasonable. Pet. App. 7. The 2001-1 Policy Statement sets forth three ways to determine the value of the services furnished by a mortgage broker. First, "careful consideration" must be given to "fees paid in relation to price structures and practices in similar transactions and in similar markets." 66 Fed. Reg. at 53055 (quoting 1999-1 Policy Statement, 64 Fed. Reg. at 10084). Second, the "level of difficulty involved in

qualifying applicants for particular loan programs" should be considered. *Id.* Finally, HUD considers "loans of similar size and similar characteristics within similar geographic markets." *Id.* Sutton failed to submit any competent evidence of valuation in accordance with these three methods. The Eleventh Circuit properly rejected Sutton's argument that his subjective valuation of the services should be considered in determining whether the total compensation was reasonable. Pet. App. 6.

The Eleventh Circuit's decision was correct and closely adheres to prior case law and the HUD Policy Statements. The decision at issue does not conflict with decisions of other circuits.

CONCLUSION

For these reasons, Countrywide asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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